83-279

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ALEXANDER L. STEVAS,
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

PIUS XII ACADEMY, INC., Petitioner

-VS

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under 26 U.S.C. 501(c)(3) a private school for the education of youth is exempt from federal taxation, when it is not yet fully organized to achieve the educational purposes set forth in its Articles of Incorporation?

2. May the Commissioner of Internal Revenue defer recognition of exempt status until full organization of the school is accomplished, when that very recognition of exemption under the circumstances of the case is a crucial and indispensable condition precedent to full organization?

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1. The decision below has the practical effect of barring all non-profit corporations in Kentucky, Michigan, Ohio, and Tennessee from utilizing State-sanctioned fund raising plans (or any fund-raising plans) during the period of time when they are not fully organized and stand most in need of financial assistance to begin to achieve their purposes..... 13

2. The decision below stifles the private initiative of citizens in matters that are perfectly honorable and redound to the common good of all, and to that extent it obstructs and

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PIUS XII ACADEMY, INC., Petitioner

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner Pius XII Academy, Inc. respectfully prays that a Writ of Certiorissue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 23, 1983, and appearing in the Appendix hereto.

OPINION BELOW

No opinion was rendered by said Court of Appeals. The court merely found that no prejudicial error intervened in the

judgment and proceedings of the United States Tax Court, and for that reason the Tax Court's judgment was affirmed. The opinion of the Tax Court appears in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was filed and entered on May 23, 1983. This Petition for Certiorari was filed within 90 of that date. This Court's jurisdiction is invoked under Title 28 of the United States Code, section 1254(1), wherein this Court, at the instance of a petitioning party, may review any civil or criminal case in the courts of appeals.

FEDERAL STATUTE INVOLVED

United States Code, Title 26, section 501(c)(3):

Exempted from federal taxation are the following: "Corporations, and any community chest fund, or foundation, organized

and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office."

STATEMENT OF THE CASE

Petitioner Pius XII Academy, Inc. is an Ohio non-profit corporation, chartered in 1979. There are no parent corporations, subsidiaries, or affiliates of same in existence. In that year it filed for recognition of exemption from taxation under 26 U.S.C. 501(c)(3). After a mutual

interchange of correspondence, at length the Respondent Commissioner issued a formal denial of recognition of exempt status. Pursuant to 26 U.S.C. 7428 the Academy then filed in the United States Tax Court a petition for a declaratory judgment that it was, in fact, exempt from federal taxation.

Said Tax Court, however, entered decision for the Commissioner, more or less adopting the Commissioner's view of the case: namely, that the Academy had "failed the operational test due to its failure to supply requested information needed" and that it had "not shown that the prospect of its operating a school within the foreseeable future is likely."

Since the Academy was domiciled in Ohio it duly filed an appeal from the TaxCourt to the United States Court of Appeals for Sixth Circuit in Cincinnati. Further, it moved to proceed "in forma pauperis", but

no decision was rendered on that motion until 23 days after entry of the order affirming the Tax Court. On said day, June 15, 1983, a Mandate was issued that the Commissioner recover his costs for printing his briefs: ($81.40). This was tantamount to a retrospective denial of the Academy's motion and a finding that its appeal was frivolous. In any event, the record showed that the Academy had no assets of any sort. Whether the appeal was frivolous, i.e., lacking in seriousness or importance, trivial, play-acting, etc., depends on whether the determination of the Academy's rights at the administrative level was eminently just, and whether petitioner had any cause for complaint.

At that level, the Commissioner requested information which the Academy did not have. For instance, it did not have a detailed description of the curriculum. It did not

have faculty members. It did not have a proposed budget for the first two taxable years. Its location was yet unknown. The Commissioner wanted to know many things that were yet unknown to the incorporators of the Academy. The Commissioner refused recognition of exempt status, precisely because they could not answer all his questions.

But most of his questions were answered, as a reading of the Internal Revenue Service Administrative Record will reveal, should this Supreme Court grant the Writ. One excerpt therefrom: "We [the Academy] hope to offer the courses presented in the public high schools of Ohio, with some exceptions. Similarly for grade schools. Such high school courses would be art, business education, english, industrial arts, music, science, social studies, foreign language, home economics, mathematics, religion.

However, at this time we are not yet sufficiently organized to produce curriculum guidelines, etc."

Said Administrative Record also shows in the words of Petitioner why the Academy could not fully satisfy the Commissioner: "There is not a business in the whole world that could provide detailed information, detailed budget and detailed expenses, etc., customers, etc. until initial capital stock was placed into the business. In our case, we would have to pay teachers to plan a curriculum and graded course of study, being without funds to do so." (Emphasis added) "Basically, we need funds from Charitable Bingo in order to advance toward operating capacity; yet under present Ohio Law (not yet judicially tested) we cannot apply for a Bingo license, until we received a federal letter allowing recognition of Exemption. This is our dilemma." Said Record further shows that the people

of Ohio amended their Constitution in 1975 to legalize the lottery known as Bingo, when operated for charitable purposes. (See Article XV, Section 6 of Ohio Constitution, repealing 1851 prohibition) Implimenting Acts barred the use of the Bingo proceeds for the benefit of any private individual. Criminal penalties were enacted for violations and the Charitable Foundations Section of the Ohio Attorney General's Office was constituted the licensing authority. Ohio Revised Code 2915.01 et seq.

In argument below, a letter from an educational consultant was proffered, not as evidence in addition to the Administrative Record, but in order to alert the Tax Court to take notice of what is common knowledge; namely, THAT IT TAKES A WHOLE LOT OF MONEY TO COMPLETE THE ORGANIZATION OF A SCHOOL. The detailed information that the Academy could not supply to the Respondent Commissioner pertained to

matters which are intimately connected with the outlay of money. For example, the Commissioner wanted a proposed budget for the first two taxable years; but this depends on the actual experience of income, at least in good business practice. Petitioner had hoped to make money from Bingo, but had no actual experience of income; and to supply the Commissioner with merely speculative information is tantamount to supplying him with no data at all.

This tax case began in 1979 as an innocent Form 1023 Application for Recognition of Exemption. The Academy has never had any assets, and yet the Commissioner has been contending with the Academy for 4 years. Petitioner's counsel is from one of the families interested in the school and has given freely of his time. To state our case succinctly: "We want the government to help us, not hinder us!"

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS HAS THE PRACTICAL EFFECT OF BARRING ALL NON-PROFIT CORPORATIONS OR ASSOCIATIONS IN KENTUCKY, MICHIGAN, OHIO AND TENNESSEE from UTILIZING STATE-SANCTIONED FUND-RAISING PLANS (OR ANY FUND-RAISING PLANS) DURING THE PERIOD OF TIME WHEN THEY ARE NOT YET FULLY ORGANIZED AND STAND MOST IN NEED OF FINANCIAL ASSISTANCE TO BEGIN TO ACHIEVE THEIR PURPOSES.

That exempt status should be recognized "early on" before substantial time and resources have been committed to actual operation, was the thought of Tax Court Judge Fay in Dumaine Farms -vs Commissioner, 73 T.C. 650 (1980). It was his belief that this early recognition) was the object which Congress had in mind when enacting the new declaratory judgment procedure: 26 U.S.C. 7428.

In any event, the decision of the United States Court of Appeals for the Sixth Circuit in the instant case necessarily overrules the inference (if not the holding) in Dumaine Farms that recognition of exempt status can be a legally appropriate preliminary step towards full organization and operation. As a result of this decision, organization must be complete and some operation undertaken, before the Commissioner is warranted in confirming exempt status. If future funds from Charitable Bingo are counted on by Ohio non-profit incorporators to bring their plans to fruition, they may as well file dissolution papers. They can't get a Bingo license without a federal exemption letter, and they can't get a federal exemption letter without a Bingo license, at least as a practical matter.

Underlying the thinking both of the Commissioner and the Tax Court, I believe,

is not so much a professed ignorance about the Academy, but rather a disbelief that organizing a school could be a seriously intended and honestly avowed purpose of a Bingo game. It is as though the Academy's adversaries want to repeal the recently enacted Ohio Constitutional Amendment. However, money from Ohio Charitable Bingo is guaranteed to go to charitable purposes. It can't be touched. It is a safer fund than any incorporator's personal bank account, from which he can draw at will. A jail term awaits those who are discovered to be using Bingo proceeds for their own private ends. A regular accounting has to be made to the Ohio Attorney General. If for some reason a school, for example, never opens its doors, unused Bingo proceeds by Ohio law must be distributed to charities of a similar nature or, in default thereof, given to the Ohio Attorney General, for his distribution, according

to law.

In his opinion below, Tax Court Judge Forrester seems to put the organization of a school in the same category of accomplishment as the organization of a Bingo game - as if an institution to prepare children for life can be set up, structured and made functional with equal dispatch!!! After attributing to Petitioner only a concept for a school in the future, he hastens to add: "Once a bingo license was obtained petitioner knew precisely how it would conduct the games..." (Emphasis added) Clearly, a dislike for Bingo colors the judge's thinking, and ulterior motives, by innuendo, are attributed to Petitioner's incorporators.

Pursuant to the Constitution of the United States, Article IV, Section 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Analogically, although not by strict logic, it follows that Ohio's Constitutional Amendment (a public act) to sanction public Bingo for charitable purposes has created a state of affairs in Ohio which must not be "legislated against" in the rationale which underlies judicial decisions.

In summary, it is petitioner's contention that the Declaratory Judgment Act (26 U.S.C. 7428) was enacted by Congress to help non-profit groups gain confirmation of exempt status under 26 U.S.C. 501(c)(3) right in the very process of getting organized and becoming operational. Further, it is counsel's belief that a certain antipathy against Bingo as a legitimate fund-raising device for honorable causes has colored the thinking of the Commissioner and the Tax Court to the end that the Academy has been "frozen in its tracks", as it were, in its attempts to advance to complete development.

The decision of the Court of Appeals, in affirming everything below, is likely to become a judicial precedent (in the region of the Sixth Circuit, at least) to be followed by the Respondent Commissioner in denying recognition of exempt status to every otherwise legitimate non-profit group which regards said recognition as a necessary and indispensable step towards full organization and operation.

If this is the law of the land, Petitioner wants this Supreme Court to declare it!

2. THE DECISION OF THE COURT OF APPEALS STIFLES THE PRIVATE INITIATIVE OF CITIZENS IN MATTERS THAT ARE PERFECTLY HONORABLE AND REDOUND TO THE COMMON GOOD OF ALL, AND TO THAT EXTENT IT OBSTRUCTS AND IMPEDES THE ATTAINMENT OF AUTHENTIC PURPOSES FOR WHICH GOVERNMENTS ARE INSTITUTED.

A group of people in Columbus, Ohio

determined to establish a private school for the Christian education of their children, They were sincere, but they were not rich. The 1975 legalization of charitable Bingo was regarded by them as a providential means for obtaining funds to bring their resolve to fruition.

Since Ohio law, however, mandated a federal tax exemption letter as a prerequisite for obtaining a Bingo license, the incorporators of the school applied for same, rendering to the Internal Revenue Service basic information about the school and outlining their exclusively educational purposes. The respondent Commissioner or his agent could have frankly conceded the school's exempt nature, for nothing was hidden from him, and eventually the school would have opened its doors. Unfortunagely, the Commissioner was not satisfied and wanted further information. Petitioner did not have that information - and now 4

years later, this group of people are at the door of the United States Supreme Court.

Mr. Justice Blackmun of this Court wrote in 1974 : "...I am disturbingly aware of the overwhelming power of the Internal Revenue Service. This power is such that its mere exercise often freezes tax status so as to endanger the existence of philanthropic organizations and the public benefits they secure merely because the path to judicial review is so discouragingly long and expensive." Commissioner -vs Protestants and Other Americans, 416 U.S.752. In point of fact, the case history of Pius XII Academy, Inc., Petitioner herein, graphically illustrates the effects noted by Justice Blackmun. However, the Academy still has enough courage left to "come to bat" for their children in the highest court in the land.

With respect to the private education of children, Mr. Justice McReynolds, in

the celebrated Oregon School case of 1925, declared that the child "is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize, and prepare him for additional duties." Pierce -vs Society of Sisters, 268 U.S. 510 It is statements like this that spur Pius XII Academy onward.

If the families behind this school were independently wealthy, Petitioner would have already made the expenditure of funds necessary to complete organization and become operational. But such is not the case.

When dealing with the poor, respondent Commissioner should bear in mind what one world leader said many years ago: "It is in the power of a ruler to benefit every order of the State, and among the rest to promote in the highest degree the interests of the poor" (Leo XIII, Encyclical on the Condition of Labor, May 1891). The idea is

that rich people have many ways of protecting themselves, whereas the poor do not, and they must rely chiefly on the assistance of government.

But whether citizens are poor, middle-class, or rich, government exists for their benefit, not vice versa! This is the correct philosophy of government, and it is encouraging to see that the Administration that arrived on the scene in Washington in 1981, more and more, is championing this approach even in the field of taxation. Witness the recent announcement that tax lawyers and their clients are going to have a greater role in formulating Regulations. (J. Chapoton, Ass't Treasury Sec'y for Tax Policy, in May 1983 speech to ABA)

Not much is required from government in the way of assistance in the instant case: Only give the Academy a chance to prove itself. Do not stifle the initiative of these Columbus, Ohio families. They are

not contemplating "highway robbery."

The decision of the Court of Appeals, if allowed to stand, can serve no useful purpose in attaining the objectives of government.

CONCLUSION

Pius XII Academy, Inc. is only one private school among thousands in America, and if it cannot become operational and "ready to go", it is of no great consequence. However, its dilemma may serve as a fortuitous occasion of which this high court may take advantage to render a final nationally authoritative statement about the extent to which a school (or any philanthropic endeavor) must be organized to warrant recognition of exempt status under the Code.

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August 20, 1983

For Petitioner

APPENDIX A

No. 82-1350

FILED
May 23 1983
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PIUS XII ACADEMY, INC.,

Petitioner-Appellant,

vs : ORDER

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee.

BEFORE: EDWARDS, KRUPANSKY, and PECK, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the Tax Court, and it is therefore ORDERED that said jugment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

ISSUED AS MANDATE:
June 15, 1983
COSTS: Appellee to recover Printing of briefs $81.40

/s/ john p. hehman
John P. Hehman, Clerk

APPENDIX B

UNITED STATES TAX COURT
Washington, D.C. 20217

PIUS XII ACADEMY, INC., :

Petitioner, :

-vs : Docket No. 19842-80X

COMMISSIONER OF INTERNAL REVENUE, : T.C. Memo 1982-97

Respondent. :

Filed Feb.23,1982

MEMORANDUM OPINION

Forrester, Judge: Respondent determined that petitioner does not qualify for exemption from Federal income tax under section 501(c)(3). Petitioner challenges respondent's determination and has invoked the jurisdiction of this Court for a declaratory judgment pursuant to section 7428. The issue for decision are:
(1) whether the administrative record contains sufficient information to establish that petitioner will be operated exclus-

ively for educational purposes within the meaning of section 501(c)(3); and

(2) whether the administrative record establishes that petitioner's activities within the foreseeable future will serve purposes.

This case was submitted for decision on the administrative record under Rules 122 and 217. The evidentiary facts and representations contained in the administrative record are assumed to be true for purposes of this proceeding. Hancock Academy of Savannah, Inc. v. Commissioner [Dec. 34, 791], 69 T.C. 488, 489 (1977).

Petitioner's principal office was located in Columbus, Ohio, at the time the petitioner herein was filed.

Petitioner is a corporation formed pursuant to the laws of the State of Ohio on August 30, 1979. According to its articles of incorporation, petitioner was established:

A. To establish and maintain an institution of learning for primary and/or secondary education in a Christ-centered framework and atmosphere so that the pupil will be academically and spiritually prepared for his vocation and chosen profession in life.

B. To provide this education, so conforming with the minimum standards prescribed by the Ohio Superintendent of Public Instruction, as is consistent with the needs, methods and objectives of this institution.

C. To provide instruction in Catholic faith and morals as succinctly expressed in the Apostles' Creed and in the Teachings of the Catholic Church, with special emphasis on the teachings of Pope Pius XII.

D. In furtherance thereof, to receive property of any description by gift, devise or bequest; to purchase, acquire, lease, hold, encumber, sell, exchange, and

otherwise dispose of any property; to borrow money, with or without security and to do all things of a similar nature.

E. Members of this corporation shall be all persons who join together in establishing this institution. Each member shall be entitled to one vote in the election of the trustees or directors, the number of whom may be increased beyond three (3).

F. This corporation is further empowered to assist financially or otherwise other institutions with similar purposes and non-profit status.

At the time petitioner filed its application for recognition of exemption (Form 1023), it was not operational. In its application petitioner stated that while it had no fund-raising program, its expected sources of revenues would be from charitable bingo proceeds, parents' contributions, church contributions, third-

party donations and other, as yet undetermined, fundraising means. Its primary concern was to obtain a bingo license which, under Ohio law, is conditioned upon its being in existence for two years and upon having a determination letter from the IRS stating that the organization is exempt from Federal income tax, inter alia, under section 501(c)(3).

It was petitioner's "long-range plan" to form a "traditional Catholic School" for the education of children below the college level. As of November 21, 1979, petitioner had no students, faculty, facilities or state school charter. Additionally, it had no assets and no liabilities.

On or about December 3, 1979, respondent returned petitioner's application as incomplete. He requested petitioner to send by December 29, 1979, pamphlets, brochures and other literature about petitioner's organization, a proposed budget,

and certain information regarding petitioner's nondiscriminatory policies. Petitioner promptly responded that it had no pamphlets, brochures or budget and stated that it would conduct its operations in a nondiscriminatory manner. Petitioner concluded with the following statement:

Basically, we need funds from charitable Bingo in order to advance toward operating capacity; yet under present Ohio law (not yet judically tested) we cannot apply for a Bingo license, until we have received a federal letter allowing recognition of Exemption. This is our dilemma.

While considering petitioner's application, respondent requested further information from petitioner on February 5, 1980, including inter alia, a proposed curriculum and courses to be offered, a proposed budget for the first two taxable years, the date petitioner expected

to open its school, the location of the school, the number of grades to be taught, the number of students and faculty, the amount of tuition to be charged, and other information concerning the conduct and location of bingo games. Respondent gave petitioner 21 days to respond.

Petitioner responded on February 18, 1980, inter alia, that its courses offered would be somewhat similar to those offered in Ohio public schools, but that it was not yet sufficiently organized to produce curriculum guidelines. It also stated that it could not yet prepare a proposed budget for its first two taxable years. It hoped its school would open in August 1981, but mentioned nothing of the number of students and faculty expected, and specified the location of the school only as "somewhere in Franklin County, Ohio" Petitioner did adequately respond to most of respondent's other re-

quests for information, given the fact that it had not yet begun operations.

Respondent ruled adversely upon petitioner's application on April 22, 1980, on the basis that petitioner failed to describe its proposed operations in sufficient detail to allow respondent to determine that petitioner will be operated, if at all, exclusively for exempt purposes. After petitioner's protest, that adverse ruling was made final on July 31, 1980.

Section 501(a) and 501(c)(3) provide an exemption from Federal income tax for an organization devoted to education three requirements are met: (1) the organization must be organized and operated exclusively for education alone or in conjunction with other exempt purposes: (2) no part of its net earnings may inure to the benefit of any private person; and (3) it must not devote a substantial part of its activities to political or lobbying

activities. Hancock Academy of Savannah, Inc. v. Commissioner [Dec. 34, 791], 69 T.C. 488, 491 (1977).

In the instant matter, respondent determined that the first of these requirements was violated. If an organization fails to meet either the organizational test or the operational test, it is not exempt for purposes of section 501(a). Gen. Conf. of the Free Church v. Commissioner [Dec. 35, 901], 71 T.C. 920, 926 (1979), Hancock Academy of Savannah, Inc. v. Commissioner, supra at 492; sec. 1.501 (c)(3)-1(a)(1), Income Tax Regs. Furthermore, the burden of proof is on petitioner to overcome the grounds set froth in respondent's notice of determination. Hancock Academy of Savannah, Inc. v. Commissioner, supra; Rule 217 (c)(2)(i).

The central issue posed in this proceeding is whether petitioner is or will be operated exclusively for educational

or other exempt purposes.

Under the so-called "operational test," an organization is "operated exclusively" for exempt purposes if it is engaged primarily in activities which accomplish one or more of the purposes described in section 501(c)(3). Sec. 1.501(c)(3)-1(c)(1). Income Tax Regs; Dumaine Farms v. Commissioner [Dec. 36,-715], 73 T.C. 650 (1980); Gen. Conf. of the Free Church v. Commissioner, supra.

As of the time the petition was filed herein, petitioner had not yet conducted any activities. While it is clear that an organization need not be in actual operation before it can seek exemption from tax, it must describe proposed operations in sufficient detail to permit the conclusion that the organization will meet the necessary requirements for exemption. Dumaine Farms v. Commissioner, supra. Failure to provide respondent

with requested information, if revelant to his determination, may be grounds for denial of exemption. See Gen. Conf. of the Free Church v. Commissioner, supra. Respondent maintains that petitioner has failed the operational test due to the latter's failure to supply requested information needed to permit such a conclusion. Furthermore, respondent alleges that petitioner has not shown that the prospect of its operating a school within the foreseeable future is likely.

Petitioner's arguments reflect a misconception of respondent's position. Petitioner believes that respondent has denied its exemption because it is not operational. In fact, respondent has taken no such position. He merely contends that petitioner has failed to supply such information as would enable a conclusion that when operational, if ever, petitioner will conduct all of its

activities in a manner which will accomplish its exempt purposes. We agree with respondent.

Throughout its application and supporting documents, petitioner recites only vague generalizations of the type of operations it had planned. So vague, in fact, that petitioner has no real plan, but merely a concept or idea that at some point in the future it would, if economically feasible, operate a school.

Aside from planned bingo games, petitioner had no fundraising program. Additionally, it had not planned a curriculum, had no idea how many students would be in attendance or how many faculty would be needed, it could not predict how much money would be needed to start the school, or to operate it once it had begun, it did not know where in Franklin County, Ohio, the school would be located, nor what grades taught. All in all, the inability of

petitioner to even predict the answer to these questions indicates that it had no plan to operate a school in the foreseeable future.

Petitioner was not without some definite plans, however, it was certain that it would challenge the Ohio law requiring a two-year waiting period before an exempt organization could obtain a bingo license. Once a bingo license was obtained petitioner knew precisely how it would conduct the games, i.e. it would rent equipment, lease a hall, and employ 15 volunteers. It expected 300 people per night once a week, prizes not to exceed $3,500 per night, and profit of approximately $1,500 per week.

The administrative record clearly shows that respondent's denial of petitioner's requested tax exemption was reasonable. Petitioner's plans regarding the accumulation of income without more than a mere scintilla of an idea regarding the uses

therefore provides respondent with no way to conclude that petitioner's proposed operations (the school) will ever come to fruition and, if they do, whether they will accomplish only exempt purposes.

We have no reason to believe that petitioner has other than the best intentions to operate a school of some type at some point in the future. Our holding in favor of the respondent herein merely reflects our inability, on the administrative record, to so conclude. Furthermore, our holding does not preclude petitioner from filing a new application with respondent that includes all of the appro priate information necessary for a favorable determination. Houston Lawyer Referral Service, Inc. v. Commissioner [Dec. 34, 924] , 69 T.C. 570 (1978).

To reflect the foregoing, Decision will be entered for the respondent.

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D C. 20530
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In the Supreme Court of the United States

OCTOBER TERM 1983

No. 83-279

PIUS XII ACADEMY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' affirmance of a Tax Court memorandum decision upholding the Commissioner's denial to it of tax-exempt status. The sole question is whether petitioner submitted sufficient evidence to demonstrate that it would operate "exclusively for * * * educational purposes" within the meaning of Section 501(c)(3) of the Internal Revenue Code.[1] The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

[1]Sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) provide in conjunction that any organization "organized and operated exclusively for * * * educational purposes," or for other specified charitable purposes, "shall be exempt from [federal income] taxation."

1. Petitioner was organized in August 1979 as an Ohio non-profit corporation with the stated intention of operating a "traditional Catholic school" (Pet. App. 26, 29). Petitioner had not begun operations when it applied to the I.R.S. for a tax exemption; it had no students, faculty, assets, liabilities, educational facilities or state charter (Pet. App. 29). Petitioner's exemption application indicated that its expected sources of revenue would be "charitable bingo proceeds, parents' contributions, church contributions, third-party donations and other, as yet undetermined, fund-raising means" (Pet. App. 28-29). Petitioner expressed a strong interest in obtaining a bingo license, which, under Ohio law, is conditioned on an organization's having been in existence for two years and having secured an I.R.S. determination of tax-exempt status (Pet. App. 29).

After studying petitioner's application, the Commissioner twice requested that it supply additional information concerning the proposed operation of its school (Pet. App. 29-30). Petitioner responded inadequately, or not at all, to these requests. Specifically, petitioner admitted that it had no curriculum guidelines, stating only that its courses "would be somewhat similar to those offered in Ohio public schools"; that it could not yet prepare a proposed budget; that the school would be located "somewhere in Franklin County, Ohio"; and that it "hoped [to] open in August 1981" (Pet. App. 31). Petitioner said nothing about the number of students or faculty expected (Pet. App. 31), but did respond in some detail about its planned bingo operations (Pet. App. 37).

The Commissioner denied petitioner's application for a tax exemption and petitioner, after exhausting administrative remedies, sought review in the Tax Court.[2] The Tax

[2]Section 7428(a)(1)(A) of the Code permits an organization to seek a declaratory judgment concerning a determination by the Commissioner as to its "initial qualification or continuing qualification • • • as an organization described in section 501(c)(3) • • •."

Court held that the administrative record supported the Commissioner's denial of an exemption, agreeing that petitioner had failed to supply enough information to demonstrate that, "when operational, if ever, [it would] conduct all of its activities in a manner which [would] accomplish its exempt purposes" (Pet. App. 35-36). The court of appeals affirmed in a one-sentence judgment order (Pet. App. 24).

2. Petitioner contends that the decision below confronts it with a dilemma. In petitioner's view, the Commissioner has denied it tax-exempt status because it is not yet "fully organized" (Pet. 1), whereas it assertedly cannot become "fully organized" until it obtains its bingo license, which under Ohio law depends on its having secured a tax exemption (Pet. 18-23). This contention has no merit.

Section 501(c)(3) affords tax exemption to organizations that are *both* organized *and* operated exclusively for educational (or other charitable) purposes; an entity cannot qualify if it fails either the "organizational test" or the "operational test." *E.g., General Conference of the Free Church* v. *Commissioner*, 71 T.C. 920, 926 (1979).[3] A charity need not have begun operations to be recognized as tax-exempt. If it seeks recognition "in advance of operations," however, it must provide in its application to the I.R.S. sufficient details of its *proposed* operations "to permit a conclusion that [it] will meet the particular requirements of the section under which exemption is claimed." Treas. Reg. § 601.201(n)(1)(ii). See Treas. Reg. §1.501(a)-1(b)(1)(iii) (requiring that an application for tax exemption be accompanied by "a detailed statement of [the entity's] proposed activities"); Treas. Reg. §1.501(a)-1(b)(2) (authorizing Commissioner to "require any additional information deemed necessary" for a proper determination of exempt status).

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[3]The "organizational test" was not at issue below, since the Commissioner's rejection of petitioner's application was based solely on the "operational test." See Pet. 35.

The Tax Court properly concluded that petitioner failed to provide sufficient information to demonstrate its entitlement to a tax exemption. Petitioner's inability even to predict answers to basic questions about its proposed curriculum, student body, faculty, finances, and location indicates that "it had no plan to operate a school in the foreseeable future" (Pet. App. 37). Indeed, petitioner's plans were so vague that it had little more than "a concept or idea that at some point in the future it would, if economically feasible, operate a school" (Pet. App. 36). Because it inadequately documented its plans, petitioner failed to satisfy the "operational test" of Section 501(c)(3). Accord, *Basic Unit Ministry* v. *United States*, 511 F. Supp. 166, 168 (D.C. D.C. 1981), aff'd, 670 F.2d 1210 (D.C. Cir. 1982) (per curiam); *General Conference of the Free Church* v. *Commissioner*, 71 T.C. at 931-932; *Church in Boston* v. *Commissioner*, 71 T.C. 102, 106-107 (1978); *Levy Family Tribe Foundation* v. *Commissioner*, 69 T.C. 615, 619 (1978).[4]

Contrary to petitioner's belief (Pet. 18-19), the court of appeals' judgment does not foreclose it from operating a school, nor does it confront petitioner with a "dilemma" in view of Ohio's laws concerning bingo operations. Petitioner does not have to secure a bingo license, or even be "fully organized," in order to be accorded tax exemption; it is simply required to demonstrate, by furnishing reasonably

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[4]Petitioner's reliance (Pet. 13-14) on *Dumaine Farms* v. *Commissioner*, 73 T.C. 650 (1980), is misplaced. The organization involved in that case owned substantial assets, submitted an estimated budget, described its proposed operations in detail, and held discussions with various public organizations concerning the proposed operation of its experimental farm. *Id.* at 653-656. On those facts the Tax Court was able to find (*id.* at 671) that the organization was organized and operated exclusively for educational and scientific purposes. Petitioner, by contrast, had no assets, no facilities and no faculty, and was unable to provide the Commissioner with either a proposed curriculum or a proposed budget.

specific answers to straightforward questions about its proposed educational activities, that it meets the statutory standards. The Tax Court noted (Pet. App. 38) that its holding "does not preclude petitioner from filing a new application with [the I.R.S.] that includes all of the appropriate information necessary for a favorable determination." The decision below is purely factual, is fully supported by the record, and does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983

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NO. 83-279

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1983

PIUS XII ACADEMY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Pursuant to Supreme Court Rule 22.5, petitioner Pius XII Academy, Inc., replies herein to the respondent Commissioner's Memorandum in Opposition to a grant of a writ of certiorari, served on petitioner's counsel on October 28, 1983.

I. THE RESPONDENT'S CONCESSIONS

From a close reading of respondent's

Memorandum in Opposition it appears that the Commissioner concedes that full organization of a school is not a pre-requisite for tax-exempt status. The implication is that he would not defer recognition of exemption upon the ground that the school is not yet fully organized.

Therefore, respondent has abused its discretion by withholding recognition of exempt status, unless, to put it bluntly, Pius XII Academy is not what it claims to be: namely, a school for the Christian education of youth.

II. IS PETITIONER A SCHOOL?

In almost every case cited by the Commissioner to the Tax Court, to The Sixth Circuit, and to this Court wherein he denied or revoked recognition of exempt status, the applicant for said recognition was not what it claimed to be. For instance, a so-called "church" was not a church; a philanthropic entity was not

really that; a cultural interest promoted no culture, and so on. Moreover, all these entities were in full operation, and so the Commissioner could clearly see what was going on.

One would think that the Commissioner has some "inside" information tending to show that petitioner is not really a school. Certainly there is nothing in the Administrative Record tending to show that petitioner is not what it claims to be. In fact, on Page 2 in its Reply Brief before the U.S. Tax Court (filed 10/30/81) the Commissioner avers that he "has at all times treated as true the facts represented in the Administrative Record." Since petitioner is not operating, and the Commissioner can not see what is going on, this is not a case where he is refusing to recognize it on the grounds that it is a sham charity.

It is good that various individuals be-

come highly knowledgeable about various subjects of practical experience. I rely on them and I don't intend to degrade and demean them before this Honorable Court. However, petitioner's counsel particularly remembers the advice of his Evidence professor at Georgetown Law Center in 1959: "Beware of the Expert! SOMETIMES THEY CANNOT SEE THE FOREST, FOR THE TREES."

This is exactly, precisely and strictly what has happened in this case. The agents of the Commissioner do not have any "inside" information about Pius XII Academy. Rather, through frequent sharpening of their expertise by day to day examination of specialized subjects with respect to various charitable endeavours, they have become "bogged down" in picayune detail.

This is not to condemn them for their conscientious, diligent and thorough efforts. They render efficient service. But there should be some disinterested,

detached and aloof authority somewhere in government who "can see the forest, for the trees" - someone who can call a spade a spade.

I assume that a certain cameraderie exists in the IRS, where one backs the other. When petitioner took exception to a ruling by the IRS, the whole thing snowballed, and all the forces of the Executive Branch swung into high gear. Eventually the Solicitor General of the United States is called in to back or support before this Highest Court a cause without merit. All this time, expense, and grief could be spared, if only some disinterested person in the IRS would look at the information presented as a whole and say: "Yes Pius XII is a traditional Catholic school for the education of youth."

In the aforesaid Reply Brief to the Tax Court, the Commissioner also said: "Respondent does not doubt petitioner's

sincerity." If this is true, where is the exemption?

Contrary to the assertions on Page 4 and 5 of the Memorandum in Opposition, petitioner has furnished "reasonably specific answers to straightforward questions about its proposed educational activities." All answers rendered specific information, to the extent of petitioner's capacity so to specify. Of necessity, a school not fully organized nor yet operating can only produce information which is proportionate to the stage of its development. A school in its infancy simply cannot supply to the Commissioner the detailed knowledge gained by a school fully organized and operating.

III. ULTIMATE QUESTION FOR THE COURT

The basic justification for this Reply Brief of petitioner is respondent's contention in its Memorandum In Opposition

that the "decision below is purely factual." Petitioner vigorously opposes this contention, in the sense that it infers that there is no legal principle involved here. When a decision by a fact-finder is against the manifest weight of the evidence, a basic and substantial legal principle is involved! SUCH IS THE CASE HERE.

Beyond that, the ultimate question for the Court is this: Are Treasury Regulations, as construed by "experts", meant to be the law of the land? Petitioner is of the opinion that they are merely a guide, a help, a measuring stick to bring about a certain uniformity in the process of decision making by the IRS. They are meant to be an aid, as in this case, to those bodies applying for exempt status. It is not necessary that every question propounded pursuant to Treasury directives and rules be answered to the satis-

faction of the Commissioner's agents. It is not a contest where the objective is to win first prize, or a test where the goal is top score. Treasury regulations are not law, regarded as an end. They are merely means formulated at a certain time and place to achieve the end. If, from all the evidence presented by an applicant for charitable exemption, the reasonable man can conclude that said applicant is, in fact, what it claims to be, its application for exemption should not be denied because it didn't make top score nor win first prize.

CONCLUSION

Since the Commissioner has apparently conceded the correctness of petitioner's point of view with respect to the questions originally presented for review, all that remains for this Honorable Court to do is to call for the Administrative

Record from the Sixth Circuit. Examine it as an aloof, detached and disinterested observer to see if petitioner is indeed a school.

Better still for everyone concerned is for the Solicitor General, with leave of Court, frankly to confess judgment that Pius XII Academy, Inc., although not fully organized nor operating, is indeed an exempt educational non-profit corporation.

Respectfully submitted,

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